U.S. Department of Justice
Immigration and Naturalization Service

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425 I Street NW
Washington, DC 20536

May 17, 2001

MEMORANDUM FOR MICHAEL A. PEARSON
EXECUTIVE ASSOCIATE COMMISSIONER
OFFICE OF FIELD OPERATIONS

FROM: Michael D. Cronin /s/
Acting Executive Associate Commissioner
Programs

SUBJECT: Whether an affidavit of support is required if the alien already has, or can be credited with, 40 qualifying quarters of coverage

Under INA §212(a)(4)(C), an alien who seeks permanent residence as an immediate relative or as a family preference immigrant is inadmissible as an alien likely to become a public charge, unless the visa petitioner submits an affidavit of support (INS Form I-864) that meets the requirements of §213A. This requirement also applies to employment-based immigrants, if a relative either filed the Form I-140, or has a significant ownership interest in the firm that did file the Form I-140. Section 213A(a)(3)(A), however, provides that the obligations under a Form I-864 terminate once the sponsored alien has worked, or can be credited with, 40 qualifying quarters of coverage, as defined under title II of the Social Security Act. The affidavit of support regulation reflects this provision. 8 C.F.R. §213a.2(e)(1)(i)(B).

The question has recently arisen: Is an affidavit of support still required if, at the time the alien seeks permanent residence through admission or adjustment of status, the alien can show that he or she already has worked, or can be credited with, 40 qualifying quarters of coverage?

The policy of the Service is that an affidavit of support *is not* required if, at the time the alien seeks permanent residence through admission or adjustment of status, the alien can show that he or she already has worked, or can be credited with, 40 qualifying quarters of coverage.

The basis for this policy is that it represents the most reasonable interpretation of INA §213A(a)(3)(A) and 8 C.F.R. §213a.2(e)(1)(i)(B). The obligations under the Form I-864 come into force when the sponsored alien acquires permanent residence. But if, at that time, the sponsored alien already has worked, or can be credited with, 40 qualifying quarters of coverage, then the obligation will expire at the very moment that it begins. Requiring the affidavit of support in this situation, therefore, would serve no purpose.

INA §213A(a)(3)(B), specifies how an alien may be credited with qualifying quarters worked by someone else. If an alien claims qualifying quarters worked by a parent, the alien

may claim *all* the qualifying quarters worked by the parent before the alien's 18th birthday. INA §213A(a)(3)(B)(i). Note that the statute does not require the parent-child relationship to have existed when the parent works the qualifying quarters. So an alien can claim even those of the parent's qualifying quarters that the parent worked before the alien's birth or adoption. If an alien claims qualifying quarters worked by a spouse, however, the alien may only claim those quarters that the spouse worked during the marriage. INA §213A(a)(3)(B)(ii). It must also be the case either that the alien is still married to the person who worked the qualifying quarters, or that that person is dead. *Id.*

The alien may not claim any qualifying quarter of coverage worked after December 31, 1996, if the person who worked that qualifying quarter – whether it was the alien himself or herself or a spouse or parent – also received any Federal means-tested benefit during the same period. INA §213A(a)(3)(A) and (B) (last paragraph), 8 U.S.C. §1183a(a)(3)(A) and (B) (last paragraph).

The Office of Programs requests your assistance in disseminating this policy memorandum to your respective offices and ensuring its immediate implementation.

U.S. Department of Justice
Immigration and Naturalization Service

HQPGM 50/10

Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

May 17, 2001

MEMORANDUM FOR MICHAEL A. PEARSON
EXECUTIVE ASSOCIATE COMMISSIONER
OFFICE OF FIELD OPERATIONS

FROM: Michael D. Cronin /s/
Acting Executive Associate Commissioner
Office of Programs

SUBJECT: Effect of enactment of the Child Citizenship Act of 2000 on the affidavit of support requirement under INA 212(a)(4) and 213A

Under INA §212(a)(4)(C), an alien who seeks permanent residence as an immediate relative or as a family preference immigrant is inadmissible as an alien likely to become a public charge, unless the visa petitioner submits an affidavit of support (INS Form I-864) that meets the requirements of INA §213A. This requirement also applies to employment-based immigrants, if a relative either filed the Form I-140, or has a significant ownership interest in the firm that did file the Form I-140. The obligations under a Form I-864 terminate when the sponsored alien acquires citizenship. INA §213A(a)(2); 8 C.F.R. § 213a.2(e)(1)(i)(A).

On October 30, 2000, former President Clinton approved enactment of the Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (2000). Section 101(a) of Pub. L. 106-395 amends INA § 320, effective February 27, 2001, to read:

SEC. 320. (a) A child born outside of the United States automatically becomes a citizen of the United States when all of the following conditions have been fulfilled:

(1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.

(2) The child is under the age of 18 years.

(3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.

(b) Subsection (a) shall apply to a child adopted by a United States citizen parent if the child satisfies the requirements applicable to adopted children under section 101(b)(1).

The position of the INS is that amended §320 applies only to those persons who meet

each of the three requirements on or after February 27, 2001. If, for example, a person meets all requirements, but the person's 18th birthday occurred before February 27, 2001, the person remains an alien until he or she naturalizes under the regular naturalization procedures.

The enactment of Pub. L. 106-395 gives rise to a question: Is an affidavit of support still required if, at the time the alien seeks permanent residence through admission or adjustment of status, the alien can show that his or her admission or adjustment (on or after February 27, 2001) will automatically confer citizenship under the amended §320?

The Immigration and Naturalization Service has determined that as a matter of policy, an affidavit of support *is not* required if, at the time the alien seeks permanent residence through admission or adjustment of status, the alien can show that his or her admission or adjustment (on or after February 27, 2001) will automatically confer citizenship under §320, as amended.

The basis for this policy is that it represents the most reasonable interpretation of INA §213A(a)(2), and 8 C.F.R. §213a.2(e)(1)(i)(A), in light of Public Law 106-395. The obligations under the Form I-864 come into force when the sponsored alien acquires permanent residence. But the sponsor's obligation terminates when the sponsored alien acquires citizenship. *id.* §213A(a)(2). For this reason, if, at the time of admission, the sponsored alien will automatically acquire citizenship under the amended §320, then the obligation will expire at the very moment that it begins. Requiring the affidavit of support in this situation, therefore, would serve no purpose.

An alien seeking admission or adjustment of status must still show that the alien is not likely at any time to become a public charge, INA §212(a)(4)(A), even if the alien will acquire citizenship under amended §320, if the Service grants the application for admission or adjustment as a permanent resident. The traditional factors relating to the public charge issue, INA §212(a)(4)(B), will govern this issue. But Service officers should weigh these factors, as well, in light of the alien's likely acquisition of ci
most unusual circumstances, amended §320 will generally mean that it is *not* likely that the alien, *while an alien,* will become a public charge.

Two cases involving adopted children require special mention. An alien orphan may be adopted either before or after the child's admission for permanent residence. INA §101(b)(1)(F). If an alien orphan is adopted *before* the alien orphan's immigration,[1] then the alien orphan will be "in the legal and physical custody of the citizen parent" at the time of admission. Since the admission will satisfy the last requirement of amended §320, the alien orphan will become a citizen when admitted and no Form I-864 will be required. However, if the citizen parent is bringing the alien orphan to the United States to be adopted, the *legal* parent-child relationship will not exist at the time of admission. INA §101(b)(1)(F). The alien orphan will not acquire

[1] The alien orphan must have been subject to a full and final adoption abroad and the unmarried parent or married parents must have seen the orphan prior to, or during, the adoption proceeding abroad. See 8 C.F.R. §204.3(d)(1)(iv)(A).

citizenship until the intended adoption does establish the *legal* parent-child relationship. Since the alien orphan will not meet the requirements of amended §320 at the time of admission, a Form I-864 will still be required in that case.

Second, children adopted abroad who are not orphans as defined in INA §101(b)(1)(F), but who meet the definition of "child" in INA §101(b)(1)(E), are in the physical and legal custody of the adoptive parent(s). If the child's family is returning to the United States to reside, and the child is admitted as a lawful permanent resident, the child will automatically acquire citizenship upon admission. Therefore, adopted children, as defined in INA §101(b)(1)(E), immigrating to the United States who otherwise fulfill the requirements of §320 will also not be required to submit an I-864.

The Office of Programs requests your assistance in disseminating this policy memorandum to your respective offices and ensuring its immediate implementation.